United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Affidavit

76-6154

To be argued by
NATHANIEL L. GERBER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6154

CADET TIMOTHY D. RINGGOLD, Individually and on behalf of all other similarly situated cadets of the U.S. Military Academy,
Plaintiffs-Appellants,

—v.—

THE UNITED STATES OF AMERICA, MARTIN R. HOFFMAN, as Secretary of the Department of the Army, LT. GEN. SIDNEY B. BERRY, as Superintendent of the USMA, BRIG. GEN. WALTER F. ULMER, Commandant of Cadets, USMA, CADET WILLIAM ANDERSEN, as outgoing Chairman of the USMA Honor Code Board Committee, and CADET MICHAEL IVY, as incoming Chairman of the USMA Honor Code Board Committee.
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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Preliminary Statement

Plaintiff-Appellant Timothy G. Ringgold appeals from a Final Judgment and Order of the Honorable Richard Owen entered in the United States District Court for the Southern District of New York on September 13, 1976 (A. 5-6).* The Judgment is predicated upon an oral

* References to the Joint Appendix prepared by appellant ar designated "A. —". References to the Supplemental Appendix prepared by the appellees are designated "S.A. —".

decision rendered June 9, 1976 in open court (A. 26-29), a written memorandum and order dated June 17, 1976 (A. 23-25), and a written opinion and order dated September 3, 1976 (A. 7-21), wherein Judge Owen denied plaintiff's motions for a preliminary injunction and for an order convening a three judge court and granted the Government's motion for summary judgment. As is demonstrated by appellant's statement of the issues (Appellant's Brief, p. 7), however, the instant appeal challenges only those findings contained in Judge Owen's decision of September 3, 1976, granting summary judgment in favor of the Government and does not challenge the denial of plaintiff's motions for preliminary injunctive relief and for the convening of a three judge court.

Appellant who during the pendency of this action below was a Cadet at the United States Military Academy at West Point (the "Academy") has challenged the constitutionality of the Honor Code, a code of discipline governing cadet affairs at the Academy. Although brought as a class action in behalf of all other cadets charged with Honor Code violations, the class was never certified pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Issues Presented

1. Whether this appeal should be dismissed for mootness.

2. Whether the District Court was correct in holding that plaintiff's failure to exhaust his administrative remedies would not bar judicial review of his claims.

3. Whether the District Court correctly held that the Honor Code and System was properly promulgated by the

Executive and within the scope of its rule making authority.

4. Whether the District Court correctly held that the Honor System was not violative of plaintiff's constitutional right to due process.

5. Whether the District Court properly rejected plaintiff's claims that the Code is unconstitutionally vague.

Statement of the Case

This action was commenced by Order to Show Cause on June 1, 1976, wherein plaintiff sought a preliminary injunction against continued administration of the Honor Code at the Academy and other relief (A. 31-33). In accompanying papers, plaintiff contended that the Code was predicated upon an unlawful exercise of Executive authority and unconstitutionally vague, and that its mode of enforcement constituted selective prosecution and was violative of plaintiff's right to procedural due process. In response to plaintiff's application, the Government moved by Order to Show Cause for an order dismissing the complaint for failure to state a claim and for lack of subject matter jurisdiction predicated upon plaintiff's failure to exhaust the administrative remedies available to him under the Honor Code and System.

After oral argument held June 9, 1976, the District Court rendered an oral decision denying the motion for a preliminary injunction on the ground that plaintiff had failed to demonstrate a sufficiently serious question going to the merits of any of his claims. In addition, Judge Owen found that "there is a substantial and serious question here of failure to exhaust administrative remedies"

(A. 27) and that plaintiff had failed to demonstrate any irreparable injury by reason of the availability of such remedies which would have to be exhausted before plaintiff could be involuntarily separated from the Academy (A. 28). Thereafter, on June 16, 1976, a brief memorandum and order was filed wherein the District Court denied plaintiff's motion to convene a three judge court on the ground that the Honor Code was an administrative regulation whose constitutionality could be adjudicated by a single judge.

On September 3, 1976, the District Court entered a final opinion and order granting summary judgment in favor of the Government and dismissing the complaint. The Court held that the power to regulate the armed forces resided in the Executive pursuant to the President's constitutionally designated role as the commander in chief. Although the Constitution authorizes the Congress "to make rules for the Government and Regulation of the land and naval forces", Article I, § 8, so long as the rules prescribed by the President are not inconsistent with Congressional statutes, they are within the scope of his authority as commander in chief. The Court found that the Honor Code and System were entirely consistent with the relevant Congressional statutes and that pursuant to 10 U.S.C. §§ 3012 and 3061, Congress has explicitly authorized the President or his delegate to "prescribe regulations for the government of the Army" including "training . . . preparedness and effectiveness." Judge Owen summarily rejected plaintiff's remaining claims regarding procedural due process and unconstitutional vagueness noting that these claims had already been rejected by this Court in *Andrews* v. *Knowlton*, 509 F.2d 898 (2d Cir.), *cert. denied*, 423 U.S. 873 (1975) and by the District of Columbia Circuit in *Dunmar* v. *Ailes*, 348 F.2d 51 (D.C. Cir. 1965). As to the selective prosecution claim, Judge Owen found that plaintiff had

failed to make the necessary allegation that the purported discrimination was based upon impermissible considerations such as race or religion.

In disposing of plaintiff's claims on the merits, Judge Owen preliminarily held that his conceded failure to exhaust his administrative remedies did not preclude judicial review. The rationale of this holding was that plaintiff's challenge was directed toward the constitutionality of the Honor Code rather than the result of its application to him and that there was no stage in the administrative route at which such claims could be properly represented.

Statutes and Regulations

Article 2, Section 2 of the Constitution designates the President as Commander in Chief of the Armed Forces:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *

Congress has authorized the President generally to prescribe regulations for the Army in 10 U.S.C. § 3061:

> "The President may prescribe regulations for the government of the Army."

In addition, Congress has specifically delegated to the Secretary of the Army (the "Secretary") responsibility for the training, preparedness and effectiveness of the Army and the power to prescribe all necessary regulations to carry out these functions in 10 U.S.C. § 3012:

> (a) There is a Secretary of the Army, who is the head of the Department of the Army.
>
> (b) The Secretary is responsible for and has the authority necessary to conduct all affairs of the Department of the Army, including—

> (1) functions necessary or appropriate for the training, operations, administration, logistical support and maintenance, welfare, preparedness, and effectiveness of the Army, including research and development;
>
> * * * * *
>
> (g) The Secretary may prescribe regulations to carry out his functions, powers, and duties under this title.

10 U.S.C. § 4334 provides that supervision of Academy affairs lies with the Army under officers assigned by the Secretary:

> (a) The supervision and charge of the Academy is in the Department of the Army, under officers of the Army detailed to that duty by the Secretary of the Army.
>
> (b) The immediate government of the Academy is under the Superintendent, who is also the commanding officer of the Academy and of the military post at West Point.
>
> (c) The Commandant of Cadets is the immediate commander of the Corps of Cadets, and is in charge of the instruction of the Corps in tactics.
>
> (d) The permanent professors and the registrar exercise command only in the academic department of the Academy.

Pursuant to this authorization, the Secretary has promulgated regulations which govern the affairs of the Academy including, at Article 12, the grounds for separation or other disciplinary action against a cadet, and, at Article 16, the procedures to be followed before separation may be ordered.

Section 12.14 of Article 12 provides (A. 219):

> The Cadet Honor Code states that a cadet will not lie, cheat or steal, nor tolerate those who do. A cadet who violates that Cadet Honor Code shall be separated from the Military Academy.

Section 16.03 of Article 16 sets forth the procedures for separation including the convening of Boards of Officers (A. 222-224). Section 16.04 provides for automatic review of Board of Officers proceedings by the Department of the Army (A. 224). Separation may be ordered only by the Secretary.

The provisions of Article 16 are supplemented by 32 C.F.R. §§ 519.1 *et seq.* which apply to all army investigations and provide broad outlines for the convening and conduct of Boards of Officers. These regulations impose elaborate due process requirements on every Board determination. The individual under investigation is entitled to written notice (32 C.F.R. § 519.1(f)); to counsel (32 C.F.R. § 519.1(h)); to the personal appearance of witnesses wherever possible (32 C.F.R. § 519.1(e)(2)); to offer opposing and rebuttal evidence (32 C.F.R. § 519.1 (f)); and to written findings based upon substantial evidence (32 C.F.R. § 519.3).

Since the initiation of this appeal, various changes have been made in Article 16. Specifically, on November 12, 1976, section 16.03 was amended to provide that a cadet charged with violation of the Honor Code may in the discretion of the Superintendent be tried by court-martial, if the conduct includes a violation of the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*, be brought before a Board of Officers convened by the Superintendent, be brought before a Full Honor Board convened by the Commandant of Cadets under the provisions of the Cadet

Honor Committee or be permitted to resign. Although there are some distinctions between the procedures followed by a Board of Officers and those of a Full Honor Board, the due process requirements imposed by 32 C.F.R. §§ 519.1 *et seq.* apply with equal force to both. The amended version of Article 16 is set forth in full at S.A. 7-10.

Prior to adjudication of an alleged Honor Code violation by a Board of Officers or, alternatively, since the recent amendments, by a Full Honor Board, initial investigation is conducted by members of the Cadet Honor Committee.* The basic guidelines for the cadets in the operation of their Honor Code Committee were promulgated by the Superintendent pursuant to his authority in 10 U.S.C. § 4334. The internal workings of the Cadet Committee are determined by the cadets each year. The regulations governing the Cadet Committee which investigated appellant are set forth at A. 132-184.**

On November 12, 1976, the cadets enacted new Honor Committee procedures which are set forth at S.A. 12-40. Pursuant to the aforementioned recent amendment of Article 16, these changes have been approved by the Superintendent (S.A. 11).

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* Prior to the recent amendments, the convening of a Cadet Honor Committee was precipitated by the findings of a sub-committee (A. 15-18). Under Article 16, as amended, and the newly adopted Honor Committee procedures, discussed *infra*, the function of the sub-committee has been substantially preserved (S.A. 15-19). The Cadet Honor Committee, however, has been replaced by the Full Honor Board, as explained above.

** A more concise description of the Cadet Honor Committee procedures may be found in *Andrews* v. *Knowlton, supra*, 509 F.2d at 902.

Statement of Facts

In May of 1976, appellant was a third year cadet in good standing at the Academy. On May 10, 1976, he was referred to a Cadet Honor Committee for consideration of an alleged violation of the Honor Code. The alleged violation arose out of a conversation between appellant and Assistant Secretary of the Army Norman R. Augustine, wherein appellant allegedly stated that he had knowledge of numerous instances of cheating at the Academy. As a result of this admission, which was overheard by other cadets who testified before the Honor Committee, the Committee concluded by unanimous vote that appellant had violated the Honor Code prohibition of toleration. Appellant declined to appear before the Committee (A. 104).

Although in the normal course, the findings of the Honor Committee may be referred to a Board of Officers for adjudication (A. 160), the Commandant of Cadets, after reviewing the file developed by the Committee, declined to forward the matter to the Superintendent for his determination of whether a Board should be convened. However, on May 25, 1976, appellant on his own initiative appeared before the Commandant of Cadets and admitted to having tolerated violations of the Code. As a result, the Commandant recommended to the Superintendent that appellant be referred to a Board of Officers. No such referral had been made, however, as of the commencement of this action (A. 104).

The charges against appellant were never referred to a Board of Officers even during the pendency of this ac-

tion and on August 17, 1976, appellant resigned from the Academy effective September 1, 1976 (S.A. 3-5).*

ARGUMENT

POINT I

The appeal has been rendered moot by appellant's resignation from the Academy.

Under Article III of the Constitution, federal courts have jurisdiction to decide only "cases" and "controversies". This language has been interpreted to mean that "' federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them'." *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974), quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). Since this action was never certified as a class action by the District Court, and the only named plaintiff has voluntarily resigned from the Academy, no decision by this Court as to the issue raised by appellant would affect his rights. Accordingly, this appeal has been rendered moot and should be dismissed.

The only arguably relevant exception to the mootness doctrine is if the underlying dispute between the parties

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* On August 23, 1976, the Secretary promulgated Army Regulation 1-6 which offers to Cadets charged with violating the Honor Code the alternative of resigning from the Academy rather than completing the military adjudicatory process, with the option to apply for readmission one year later. Although appellant's resignation predated the regulation, the Army is treating it as a 1-6 resignation such that appellant may apply for readmission should he so desire. By letter dated December 20, 1976, appellant advised Academy officials of his desire to apply for readmission pursuant to this regulation (S.A. 2).

is one "capable of repetition, yet evading review". *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). *See also Nebraska Press Association* v. *Stuart*, 96 S. Ct. 2791, 2797 (1976). In *Sosna* v. *Iowa*, 419 U.S. 393 (1975), the Supreme Court considered this exception to the mootness doctrine and decided that, in the absence of a class action, it is limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. *Id.* at 399-402. See also *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).

Neither of these conditions is met under the circumstances of this action. The impact of the challenged disciplinary procedures is permanent as to those adversely affected thereby. Here, however, appellant has of his own volition taken himself beyond the scope of these procedures by voluntarily resigning from the Academy. It is therefore literally impossible that appellant would again be subjected to those procedures. Accordingly, the instant case does not satisfy either element. Even if the challenged disciplinary procedures were to continue in effect, there is no possibility, and certainly no "demonstrated probability" that appellant will again come within their number. See *Weinstein* v. *Bradford*, *supra*, 423 U.S. 147; *O'Shea* v. *Littleton*, 414 U.S. 488 (1974).

Appellant may contend that in view of his stated intention to apply for readmission pursuant to Army Regulation 1-6, there does exist the requisite probability that he will again be subject to the challenged disciplinary procedures. There is no showing, however, as to the like-

lihood that he will in fact be readmitted.* Moreover, even if he were readmitted, he would not be subject to those procedures unless he were to again violate the Honor Code.**

Finally insofar as his challenge to the Honor Code is predicated upon a denial of due process, that alleged defect has been cured by the recent change in Army regulations and Honor Committee procedures. Whereas previously, due process may not have been accorded an accused cadet at the Honor Committee stage, the Honor Committee has now been replaced by the Full Honor Board which adheres to the same due process requirements that govern proceedings before a Board of Officers.

POINT II

The complaint should have been dismissed for failure to exhaust administrative remedies.

As argued in Point I, this Court need not reach the merits of appellant's claim and should dismiss the appeal for mootness. There is an additional reason that this appeal should be dismissed without consideration of the merits, namely, appellant's conceded failure to exhaust his available administrative remedies. Although this argument was raised below and rejected, it should be considered by this Court, particularly in view of appellant's subsequent resignation from the Academy.

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* It should be noted that a group of cadets have challenged the constitutionality of the very regulation under which appellant seeks readmission. See *D'Arcangelo* v. *Berry*, 76 Civ. 3948 (RLC). In that case, Judge Carter has advised counsel that he intends to dismiss the complaint but has not yet filed his decision.

** Appellant does not dispute that he violated the Honor Code prohibition against toleration (A. 104). This was noted by the District Court in its decision dismissing the complaint (A. 13).

The rule prohibiting judicial review of administrative decisions where the party seeking review has failed to exhaust the available administrative remedies is well established. *Brown* v. *General Services Administration*, 507 F.2d 1300, 1307-08 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976); *McKart* v. *United States*, 395 U.S. 185, 194-195 (1969). The doctrine has been specifically applied in this Circuit to cases involving military separations. *Michaelson* v. *Herren*, 242 F.2d 693, 696 (2d Cir. 1957). *Accord*: *Horn* v. *Schlesinger*, 514 F.2d 549 (8th Cir. 1975). See also *Bard* v. *Seamans*, 507 F.2d 765 (10th Cir. 1974); *Birdwell* v. *Schlesinger*, 403 F. Supp. 710 (D. Colo. 1975); *Yonan* v. *Seamans*, 380 F. Supp. 505 (N.D. Ill. 1974).

Courts will consider the validity of non-final administrative action only where it amounts to a final deprivation of individual rights which cannot be adequately vindicated through subsequent judicial review. *Mathews* v. *Eldridge*, 424 U.S. 319, 330-331 (1976); *Phillips Petroleum Co.* v. *Brenner*, 383 F.2d 514, 518 (D.C. Cir. 1967).

As this Court observed in *Natural Resources Defense Council* v. *United States Nuclear Regulatory Commission*, 539 F.2d 824, 836-837 (2d Cir. 1976):

> To determine finality, the appropriate inquiry is whether the process of administrative decision-making has reached a stage where judicial review will not be disruptive of the agency process and whether legal consequences will flow from the action taken; . . .

Herein, if appellant had not resigned, his involuntary separation from the Academy could come about only if ordered by the Secretary after a *de novo* hearing before a Board of Officers and review by the Superintendent and

Judge Advocate General of the Department of the Army. No adverse legal consequences or injury would have flowed until appellant had exhausted his administrative remedies. Accordingly, the complaint should have been dismissed for failure to exhaust.

The District Court held, however, that the exhaustion doctrine was inapplicable because appellant's challenge was to the "legal and moral basis" of the Honor Code and that there was no stage within the administrative process "at which plaintiff would have the opportunity to present his arguments to a judicial body" (A. 13). While admittedly it would be unreasonable to anticipate that the Secretary might declare the Honor Code unconstitutional, it is quite possible that appellant would have been exonerated had he appeared before a Board of Officers and completed the administrative process. This would have accorded him the underlying relief sought in this action without any need for a declaration as to the lawfulness of the Honor Code or the method of its enforcement.

We do not dispute that administrative remedies need not necessarily be exhausted in exceptional cases involving constitutional questions coupled with a showing of the inadequacy of the prescribed administrative relief. See *Fuentes* v. *Roher*, 519 F.2d 379, 387 (2d Cir. 1975); *Finnerty* v. *Cowen*, 508 F.2d 979, 982-983 (2d Cir. 1974). This is particularly so where there is threatened or impending irreparable injury flowing from the delay incident to exhaustion. *McGrath* v. *Weinberger*, 541 F.2d 249, 251-252 (10th Cir. 1976). Here, however, the unutilized administrative remedies might well have afforded the underlying relief sought and thus eliminated any need for the Court to pass on the constitutional issues. As the Supreme Court observed in *Aircraft &*

Diesel Equipment Corp. v. *Hirsch*, 331 U.S. 752, 772 (1947), so long as there is an efficacious administrative remedy, "[t]he very fact that constitutional issues are put forward constitutes a strong reason for not allowing . . . suit either to anticipate or take the place of [administrative action]." *See also Wallace* v. *Lynn*, 507 F.2d 1186, 1190-1 (D.C. Cir. 1974). This is but a facet of the principle that courts avoid constitutional adjudication where other grounds are dispositive.

Moreover, even if it were determined after exhaustion that the constitutional issues would have to be determined through judicial review, that review would be facilitated by the development of a necessary factual context. *See DuBois Clubs* v. *Clark*, 389 U.S. 309, 312 (1967). This is particularly important in view of the nature of the constitutional issues raised. Appellant contends that the denial of due process at the Cadet Honor Committee precludes a fair hearing before a Board of Officers, that the Board hearing is tainted by the adverse conclusions drawn by the Honor Committee, and that the Board is not impartial because of the attitudes of its members. Although in the final analysis, we believe that these claims will be found frivolous, they are best resolved on the basis of a factual record developed through exhaustion of the administrative process.

POINT III

The District Court correctly held that the Honor Code is valid and enforceable.

Appellant contended below that the promulgation of the Honor Code and System by the Executive infringed upon the constitutional power of Congress "to make Rules for the Government and Regulation of the land and naval Forces". Art. I, § 8, cl. 4. Specifically, pursuant to this power, Congress has enacted a body of law concern-

ing military discipline, the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §§ 801 *et seq.*, which, appellant claims, preempts the Honor Code promulgated by the Executive.

This contention, however, squarely contradicts both the Constitution as well as various Congressionally enacted statutes which delegate the necessary power to the Executive and specifically to the Secretary and his military delegates. The Constitution denominates the President Commander in Chief of the armed forces. Art. 2, § 2. Pursuant to that constitutional denomination, his authority, "to establish rules and regulations for the government of the army, is undoubted". *United States* v. *Eliason*, 41 U.S. (16 Pet.) 291, 300 (1842). In furtherance of this provision, Congress has authorized the President to "prescribe regulations for the government of the Army." 10 U.S.C. § 3061. Moreover, Congress has explicitly delegated to the Secretary the relevant responsibility for the "training, . . . preparedness, and effectiveness of the Army" and the power to prescribe regulations to carry out these responsibilities. 10 U.S.C. § 3012. Finally, Congress has delegated responsibility for the "supervision and charge of the Academy" to the Secretary and provided that the "immediate government of the Academy is under the Superintendent". 10 U.S.C. § 4334.

Pursuant to the constitutional role of the President, as confirmed and implemented by statutory authorization, and the statutory delegation to the Secretary, the Secretary promulgated Article 12, containing the Honor Code, and Article 16, setting forth the procedures for adjudicating its alleged violations. Similarly, although not provided in any statute or regulation, the Honor Committee System has been approved by the Superintendent

pursuant to his statutory responsibility for governing the Academy. See 10 U.S.C. § 4334. While there was no formal written sanction of Honor Committee procedures until the recent amendments, as the District Court properly held, formal authorization is not necessary since the Committee's role with respect to Honor Code violations is entirely investigative and for the purpose of encouraging self-discipline among the cadets. This view of the limited Honor Committee function has been expressly upheld by this Court in *Andrews* v. *Knowlton*, *supra*, 509 F.2d at 907. See also *Gaines* v. *Hoffman*, 75 Civ. 5120 (S.D.N.Y. January 12, 1976), *aff'd without opinion*, No. 76-6014 (2d Cir. March 15, 1976).

Appellant's polemic against the constitutionality of the Code is totally unsupported by the record. Although the Code was first established at the Academy in 1817 and has been administered by the cadets since 1923 (A. 17), Congress has never taken any steps to resist this alleged usurpation of its authority even though the authorizing statutes have been amended numerous times since the inception of the Code. Moreover, the Code and System have been judicially upheld against a variety of challenges to the Army's power to promulgate them. *See, e.g.*, *Andrews* v. *Knowlton*, 367 F. Supp. 1263 (S.D.N.Y. 1973), *aff'd*, 509 F.2d 898 (2d Cir.), *cert. denied*, 423 U.S. 873 (1975). *See also Dunmar* v. *Ailes*, *supra*.

Appellant has not demonstrated or even alleged any inconsistency between the Honor Code and System and any relevant Congressional statutes. Indeed, the regulations promulgated by the Secretary are intended to avoid conflict with the Congressionally enacted UCMJ. Army Regulation 16.03, both as originally propounded as well as in its amended version, grants the Superintendent discretion to direct that an accused violator of the Code

whose violation is also a breach of the UCMJ be tried by court-martial instead of by a Board of Officers or Full Honor Board (A. 222-223; S.A. 7). Similarly, the Cadet Honor Committee procedures provide that where a serious violation of the UCMJ is suspected, the Honor Committee must suspend its inquiry until the alleged offense has been investigated under military law (A. 152; S.A. 15).

Appellant's claim of preemption is equally devoid of merit. In this respect, he contends that the only legal grounds for expulsion are a violation of the oath prescribed in 10 U.S.C. § 4346 (which includes obedience to the UCMJ), deficiencies in conduct and study as outlined in 10 U.S.C. § 4351, and a violation of the hazing prohibition set forth in 10 U.S.C. § 4352; appellant further contends that the large number of offenses enumerated in the UCMJ, and the fact that it is made applicable to cadets, 10 U.S.C. § 802(2), indicate that Congress did not intend that there be any non-statutory basis for expulsion from the Academy.

As the District Court properly observed, even if this theory were correct, the Code could still be justified as the means by which the Academy has chosen to separate those cadets who are deficient in conduct pursuant to 10 U.S.C. § 4351. Similarly, Article 134 of the UCMJ, 10 U.S.C. § 934, prohibits, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces [and] all conduct of a nature to bring discredit upon the armed forces. . . ." The Honor Code and System could well be justified and explained as the specific means of enforcement of this Congressional provision.

No such justification is necessary, however. Appellant's argument squarely contradicts the statutory framework

whereby Congress has expressly delegated to the President and through him to the Secretary and his designates the authority and responsibility to conduct the affairs of the Academy and prescribe all necessary regulations to that end. As the District of Columbia Circuit found in *Dunmar* v. *Ailes, supra*, 348 F.2d at 55:

> We also find insubstantial the assertion that only the President may administratively separate a Cadet from the United States Military Academy. The argument is grounded on 10 U.S.C. § 4342(b), which says that 'All cadets are appointed by the President.' Even if this provision meant that the President must or does personally consider and make all appointments to the Academy, it would not necessarily follow that only the President could separate a Cadet. Nor need the President in terms delegate this function to the Secretary of the Army; indeed 3 U.S.C. § 302 provides that 'nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.' Surely the presumption of which this section speaks is raised by 10 U.S.C. § 4334(a), placing supervision and charge of the Academy—an advanced institution to train and develop officers for the highest ranks in the military establishment—within the Department of the Army under officers 'detailed to that duty by the Secretary of the Army,' and 10 U.S.C. § 3012(b), authorizing the Secretary to conduct 'all the affairs' of that Department.

See also Reed v. *Franke*, 297 F.2d 17, 23-24 (4th Cir. 1961). And as Judge Owen properly observed below (A. 19):

> Were the plaintiff correct, the Secretary of the Army would be without authority to prescribe

regulations of conduct adapted to the special circumstances and needs of the Academy. I decline to reach such a conclusion.

POINT IV

Honor Code adjudication procedures fully comply with applicable due process requirements.

Appellant contends that the Cadet Honor Committee procedures are violative of constitutional due process and that such violations are not cured by subsequent *de novo* proceedings before Boards of Officers.

This Court has held repeatedly that due process is satisfied so long as a cadet receives a fair hearing before a final decision substantially affecting his rights is reached and has limited its review accordingly *Andrews* v. *Knowlton, supra*, 509 F.2d 898; *Hagopian* v. *Knowlton*, 470 F.2d 201, 211 (2d Cir. 1972); *Wasson* v. *Trowbridge*, 382 F.2d 807 (2d Cir. 1967). As was stated in *Hagopian* v. *Knowlton, supra*, 470 F.2d at 204:

> [T]he Academy's rigorous and exacting standards of discipline, behavior and personal decorum for cadets . . . should not be interfered with by the judiciary.

See also *Friedberg* v. *Resor*, 453 F.2d 935, 937 (2d Cir. 1971).

A Cadet Honor Committee is a purely investigative body without judicial authority or function. Accordingly, its proceedings do not have sufficient nexus to findings of Honor Code violations as to warrant the imposition of due process on its operation. *Andrews* v. *Knowlton, supra*, 509 F.2d 898; *Gaines* v. *Hoffman, supra*. As stated by this Court in *Andrews*, where the Court was faced with a broad due process challenge to the same legal procedures as were allegedly used herein:

> While it is clear that the proceedings before the Cadet Honor Committee were wholly lacking in procedural safeguards, we are unpersuaded by the record now before us that the Cadet Honor Committee hearing was a critical stage in the separation of appellants from the Academy for Honor Code violations. There is no evidence in the record that the decisions by the Cadet Honor Code Committee in any way influenced the members of the Board of Officers. On the contrary, the record convinces us that the proceedings before the Board of Officers were *de novo* and were as free from infection and taint as is a trial in which jurors are aware that the defendant before them has been indicted by a grand jury. We find, therefore, that the Cadet Honor Committee is a charging body whose decisions had no effect other than to initiate *de novo* proceedings before a Board of Officers. (509 F.2d at 907.)

Likewise, in this case, there is no showing other than appellant's conclusory allegations that the Board of Officers is in any way influenced by the decisions of the Cadet Honor Committee. Indeed, appellant conceded the Board's independence when he admitted below that 40 percent of such Boards fail to find violations charged by the Honor Committee (A. 65).

There is similarly no basis for appellant's claim that the Boards are prejudiced by the attitudes of their members. In support of this proposition, his brief contains the following (p. 17):

> The guilty verdicts of those cadets who have appealed to the officer boards have for the most part been affirmed. The reason is obvious. The Board of Officers is composed of Academy prod-

> ucts, themselves, thoroughly indoctrinated in the "spirit" and the "bond" of the Academy. Such officers have survived the Code and System and now universally adopt the pre-condition that the Honor Code is a creature of the Cadet Body and the same should be self-administered by the cadets themselves with the least amount of interference from their superior officers.

This conclusory allegation reduced to its essence asserts only that an Academy officer sitting as a member of the Board cannot fairly consider evidence against a cadet, an assertion summarily rejected by this Court in *Andrews* v. *Knowlton, supra*, 509 F.2d at 907. *See also Withrow* v. *Larkin*, 421 U.S. 35 (1975); *Lopez* v. *Henry Phipps Plaza South, Inc.*, 498 F.2d 937, 944 (2d Cir. 1974). Since the bias issue is thus precluded by the non-participation of the Board members in the Cadet Committee proceeding and since discovery would not otherwise have elicited any relevant information, the District Court correctly granted the Government's motion for summary judgment without granting appellant the opportunity to take discovery. *Andrews* v. *Knowlton, supra*, 509 F.2d at 907. See also *National Nutritional Foods Association* v. *F.D.A.*, 491 F.2d 1141 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974).*

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* Appellant's remaining claim that due process is violated by the ignoming and pressure to resign which allegedly flow from guilty determinations by the Cadet Honor Committee is similarly without merit. Appellant lacks standing to assert such claim since he conceded that he violated the Code (A. 104). See *Andrews* v. *Knowlton, supra*, 509 F.2d at 907. In any event, the charge is unsupported by the record.

POINT V

The Honor Code is not unconstitutionally vague.

The District Court rejected appellant's remaining arguments without discussion. Of these, the only one raised on appeal is that the Code is unconstitutionally vague. This argument, however, has been rejected by the District of Columbia Circuit in *Dunmar* v. *Ailes*, *supra*, 348 F.2d at 55, which held as follows:

> Whatever the application of the vagueness doctrine to matters military, we feel sure that it is not the province of a court to determine what conduct is condemned, and what is not, by the "common law" of the Corps of Cadets—a creature of the Cadets themselves.

See also *Birdwell* v. *Schlesinger*, *supra*; *White* v. *Knowlton*, 361 F. Supp. 445 (S.D.N.Y. 1973), *aff'd sub nom. Andrews* v. *Knowlton*, *supra*, 509 F.2d 898.

Appellant's argument is also foreclosed by the Supreme Court's decision in *Parker* v. *Levy*, 417 U.S. 733 (1974), which rejected a vagueness challenge against Article 134 of the UCMJ, 10 U.S.C. § 934, a prohibition substantially broader than the Honor Code. The Court observed therein that because of the justifiably broader scope of regulation of military society than civilian society, a less stringent test of vagueness must be applied to military regulations. *Parker* v. *Levy*, *supra*, 417 U.S. at 756. In the military context, the appropriate standard is whether the person charged "could not reasonably understand that his contemplated conduct is proscribed." *Id.* at 757, quoting from *United States* v. *Na-*

tional Diary Corp., 372 U.S. 29, 32-33 (1963). Moreover, "even though sizable areas of uncertainty as to the coverage of the articles may remain after their official interpretation by authoritative military sources, further content may be supplied even in these areas by less formalized custom and usage." *Parker* v. *Levy*, *supra*, 417 U.S. at 754.

Herein, the provision of the Honor Code which appellant was charged with violating, "toleration," is clearly defined in the Honor Committee instruction booklet as "knowingly permitting a violation of the Honor Code to go unreported" (A. 189). Accordingly, appellant could have had no reasonable doubt that his failure to report Honor Code violations of which he had personal knowledge was itself a violation. That he had no such doubts is demonstrated by the fact that he reported himself for tolerating violations (A. 104). Accordingly, his challenge to the Honor Code as unconstitutionally vague must fail.

CONCLUSION

For the reasons stated, the decision of the District Court should be affirmed.

Dated: New York, New York
January 12, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Nathaniel L. Gerber being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 12th day of January, 19 77 he served two copies of the within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Edward S. Gallian, Esquire
Siller and Gallian
370 Lexington Avenue
New York, New York 10017

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this
13th day of January, 19 77

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978